

Report of the Task Force on
**Lawyer Ethics, Professionalism, and the
Unauthorized Practice of Law**

June 1, 2017

REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER ETHICS, PROFESSIONALISM, AND THE UNAUTHORIZED PRACTICE OF LAW

Executive Summary

The Task Force on Lawyer Ethics, Professionalism, and the Unauthorized Practice of Law (“Task Force”) was created by the Supreme Court of the State of Arizona to evaluate the mission, structure, and operations of three State Bar of Arizona (“State Bar”) committees that currently address those issues.

The Task Force recognizes that the three existing committees, along with other programs maintained by the State Bar, contribute to the protection of the public and the quality of the profession by supporting professionalism, competence, and ethical behavior. However, the Task Force recommends structural and operational changes to increase the effectiveness of this work and provide for additional public comment and judicial oversight.

Specifically, the Task Force recommends:

1. Retaining the Ethics Hotline at the State Bar.
2. Creating a Supreme Court committee to issue formal opinions addressing ethics, professionalism, and the unauthorized practice of law.
3. Amending Supreme Court Rule 48(f) (and renumbering the remaining sections of the rule) or, in the alternative, adding a new subsection (n) to Rule 48, to provide that compliance with formal opinions issued by the new Attorney Ethics Advisory Committee may be raised as a defense in discipline proceedings, much as opinions of the Judicial Ethics Advisory Committee currently may be raised in judicial discipline cases under Rule 82(h) of the Rules of the Supreme Court.
4. Requiring that formal opinions first be issued in draft form for public comment, and then finalized after completion of a public comment period and further recommending that the Supreme Court be provided an opportunity after the comment period to disapprove or “hold” a proposed opinion, such that it would not take effect.
5. That the remaining educational and rules-related functions of the Rules of Professional Conduct Committee and the Unauthorized Practice of Law Committee should remain with the State Bar; the Task Force does not take a position on how the State Bar should organize these functions.
6. That the Professionalism Course function should remain at the State Bar, whether the course is offered through the Professionalism Committee or the CLE Committee, but alternative providers whose courses are denied approval should be given an opportunity to appeal that decision through a process that provides Court oversight.

Formation and Activities of the Task Force

By Administrative Order No. 2016-101 (“AO 2016-101”), the Supreme Court of the State of Arizona created a Task Force on Lawyer Ethics, Professionalism, and the Unauthorized Practice of Law¹. This Task Force was charged with evaluating the mission, structure, and operations of

¹ A copy of AO 2016-101, which includes a list of the Task Force members, is attached to this Report as Appendix A.

the three existing State Bar Committees that address issues of ethics, professionalism, and the unauthorized practice of law: The Rules of Professional Conduct Committee, the Professionalism Committee, and the Unauthorized Practice of Law Committee. The Task Force was directed to prepare a report and recommendations no later than June 1, 2017, with any recommended rule change petition to follow by January 10, 2018.

Between October 2016 and May 2017, the Task Force met to examine these questions. The Task Force considered the current and historical practices of the existing committees, the practices of other state bars, legal and practical constraints on the operation of the committees and performance of their functions, and feedback received from stakeholders and members of the public.

Existing Structure and Function of the State Bar's Committees on Ethics, Professionalism, and the Unauthorized Practice of Law

The existing State Bar committees are organized by subject matter, with one committee assigned to address each substantive area. Currently, all members of the three committees are appointed by the President of the State Bar Board of Governors, without input or oversight by the Supreme Court. In addition to the work of the committees, State Bar staff also engage in activities relating to ethics, professionalism, and the unauthorized practice of law, both in coordination with and independent of the existing committees. The specific practices in each area differ somewhat, and are set forth below.

Ethics Committee

The Committee on the Rules of Professional Conduct (“Ethics Committee”) provides assistance to the State Bar and its members in resolving questions of professional ethics by providing non-binding opinions, education on ethics issues, and assistance to the Board of Governors in evaluating possible comments on changes to the ethics rules. The Ethics Committee also edits the Arizona Legal Ethics Handbook, published by the State Bar.

The Ethics Committee generally has between 30 and 34 members, drawn from various practice settings, substantive areas, and geographic regions. The Committee has both a chair and vice chair, drawn from the Committee’s membership, who serve two-year terms. Committee members are appointed for three-year terms. As a matter of State Bar policy, members are generally limited to two consecutive terms of service; however, exceptions have been made to maintain institutional knowledge, permit committee leaders to complete their terms of leadership service, or permit the completion of specific projects.

Ethical guidance may consist of formal or informal written opinions or informal advice in response to inquiries presenting questions of professional ethics with respect to the inquiring lawyer’s own contemplated future conduct. Ethics opinions address proper professional conduct of members of the State Bar and apply to the particular facts presented in each inquiry. Ethics opinions can arise from requests made by lawyers, either in the form of requests for an opinion or in the form of hotline calls that, singularly or in the aggregate, suggest a need for guidance on a

particular issue. The Committee also sometimes *sua sponte* issues opinions on questions that come to its attention through review of opinions from other jurisdictions, scholarly and professional articles, or examination of its prior opinions for internal consistency. Although a significant body of opinions exist from its decades of work, in recent years the Ethics Committee had not issued many opinions. It issued one formal opinion in 2016; two opinions in 2015; no opinions in 2014; two opinions in 2013; two opinions in 2012; four opinions in 2011; and four opinions in 2010.

The Ethics Hotline, operated by the State Bar, is a resource for lawyers regarding their prospective conduct. All ethics advice is given telephonically and provides non-binding, informational guidance. As a matter of internal State Bar policy, however, reliance on telephonic ethics advice may be considered as a mitigating factor in a disciplinary proceeding. The Ethics Hotline is staffed primarily by State Bar Ethics Counsel; when ethics counsel are unavailable, calls are handled by members of the Ethics Committee. In 2016, the Ethics Hotline handled 2,384 calls, suggesting that the Hotline provides a valuable and often used service.

As a matter of current practice, both advice dispensed through the Ethics Hotline and advice in the form of formal opinions of the Ethics Committee are advisory only; that is, they do not bind either the State Bar's Lawyer Regulation Office or the Supreme Court regarding what conduct is permitted under the Rules of Professional Conduct. Reliance on opinions of the Ethics Committee does not create a defense to a lawyer discipline complaint.

The Ethics Committee's educational activities consist primarily of an annual program at the State Bar Convention. The State Bar's Continuing Legal Education ("CLE") Department sponsors other ethics-related CLE programs during the year; both State Bar Ethics Counsel and various Ethics Committee members, as well as others, are called upon to speak at these programs.

Input on rule petitions is a relatively recent addition to the Ethics Committee's activities. In this area, the Ethics Committee both initiates and responds to proposed changes to the Rules of Professional Conduct, but any recommendations it makes are approved by the State Bar's Board of Governors before submission to the Supreme Court for its consideration. Changes initiated by the Ethics Committee generally arise from opinion requests that the Committee believes would better be handled by rule changes or from rule changes made or recommended in other jurisdictions (such as the ABA's Ethics 20/20 Task Force recommendations). The Ethics Committee also provides analysis to the State Bar Board of Governors in responding to ethics rule change petitions filed by other entities, drafting proposed comments to be filed by the State Bar, and providing advice to the Board of Governors and its Rules Review Committee on those proposals.

Unauthorized Practice of Law Committee

The Committee on the Unauthorized Practice of Law ("UPL Committee") discusses general unauthorized practice of law issues, focusing mainly on educational seminars and responding to requests for opinions as set forth below. The Committee is also available to discuss possible rules updates, although no major unauthorized practice of law rules updates have occurred in the last several years.

The UPL Committee generally has between 13 and 19 members, drawn from various practice settings, substantive areas, and geographic regions. The Committee chair, who serves a two-year term, is selected from the Committee's membership. Committee members are appointed for three-year terms.

The UPL Committee also issues UPL Opinions. The guidance set forth in the opinions is advisory only and non-binding. The UPL Committee issues opinions on questions regarding the interpretation of Rule 31, Ariz. R. Sup. Ct., Ethical Rule 5.5, Rule 42, Ariz. R. Sup. Ct., or the Arizona Code of Judicial Administration, Part 7, Chapter 2, Section 7-208 (governing Certified Legal Document Preparers (the CLDP Code)). The Chair of the Committee reviews all requests to determine whether the request raises a claim of legal error, factual error, or change in authority. The UPL Committee has issued a total of 14 opinions since 2004.

The UPL Committee does not have any direct input in the process for investigating and prosecuting unauthorized practice of law cases, whether against lawyers or non-lawyers, but is occasionally provided updates on statistics or trends. All enforcement issues relating to the unauthorized practice of law are handled by the State Bar's Lawyer Regulation Office.

Professionalism Committee

The Professionalism Committee provides advice and recommendations regarding the State Bar's Professionalism Course curriculum, materials, faculty, and policies. The Professionalism Committee also reviews and decides whether alternative providers may offer the Professionalism Course.

The Professional Committee generally has between 15 and 21 members, drawn from various practice settings, substantive areas, and geographic regions. The Committee has both a chair and vice chair, drawn from the Committee's membership, who serve one-year terms. Committee members are appointed for three-year terms.

Pursuant to Rule 45(a)(3), Ariz. R. Sup. Ct., newly admitted members of the State Bar are required to attend the State Bar's Professionalism Course within the first year of admission or registration, unless exempted as provided in the Rule. The course is designed to help attendees explore the importance of civility and professionalism and highlight the standards by which lawyers should treat others. The course is intended to sensitize participants to professionalism issues presented and encourage them to develop a framework for selecting a professional course of conduct as they move forward in their practice.

This live, in-person, interactive course is a one-time only requirement for State Bar members or registrants. The course is 4.25 hours long and is offered primarily by the State Bar in Phoenix and in Tucson. The course includes a welcome and an introduction from the Chief Justice of the Supreme Court of Arizona and a 45-minute presentation on identifying behaviors related to diversity and bias. During two, one-and-one-half hour break-out sessions, faculty from the legal community cover hypotheticals specifically created to address matters involving responsibilities to clients and others as well as responsibilities to the profession and the legal system. At the conclusion of the program, participants submit course evaluations. Comments and feedback from

participants are reviewed by members in the State Bar's CLE Department and the Professionalism Committee.

The Professionalism Committee does not participate in enforcement of lawyers' obligations under the Oath of Admission to the Bar or the Lawyer's Creed of Professionalism of the State Bar of Arizona. *See* Rule 54(i), Ariz. R. Sup. Ct. (providing that members may be disciplined for unprofessional conduct); Rule 31(a)(2)(E), Ariz. R. Sup. Ct. (defining unprofessional conduct as substantial or repeated violations of the Oath or Creed). As with violations of the Rules of Professional Conduct, disciplinary matters involving violations of lawyers' professionalism obligations are handled by the State Bar's Lawyer Regulation Office.

Task Force Recommendations

The functions currently performed by these State Bar Committees, and the related programs of the State Bar, go to the heart of what it means to be a professional lawyer, and therefore serve important roles in protecting the public and maintaining the integrity of the profession. The Task Force believes, however, that reorganizing some of the existing committee functions and structures will improve oversight of these important activities, provide for more effective guidance to lawyers in meeting their professional obligations, and use available resources more efficiently.

The Task Force therefore makes the following recommendations.

Effect of Opinions

Informal oral opinions. The Task Force members agree that informal, advisory guidance through the Ethics Hotline provides a valuable service to attorneys despite the fact that it is not binding in lawyer discipline proceedings. The Hotline provides an important mechanism for attorneys to obtain advice quickly, permitting and encouraging them to seek such guidance before taking action, and the Task Force recommends that the Hotline process remain intact, without alteration. The Task Force similarly recommends that the State Bar continue to provide informal, on-demand guidance regarding unauthorized practice of law matters.

Formal written opinions. The Task Force believes that formal opinions of the Ethics Committee would be more useful for the State Bar and the public if they are given legal effect in the attorney discipline process. As it now stands, formal opinions do not bind either the State Bar's Lawyer Regulation Office or, of course, the Supreme Court. Thus, if the State Bar's Lawyer Regulation Office disagrees with a formal ethics opinion, it may disregard that opinion and bring charges against a State Bar member who acted based on the opinion's analysis. Interpretive issues could ultimately be resolved by the Supreme Court exercising its oversight of the disciplinary process, but at significant cost to both the State Bar and the individual member who would need to continue litigating through the appeal phase to obtain a definitive answer.

AO 2016-101 asks whether lawyers should be afforded some degree of immunity from discipline for actions taken consistent with formal opinions. The Task Force recommends that formal opinions, issued by the appropriate body and with oversight by the Supreme Court, should be able to be raised as a defense in enforcement actions, just as Judicial Ethics Advisory Committee

opinions may be in the context of disciplinary proceedings before the Commission on Judicial Conduct. *See* Rule 82(h), Ariz. R. Sup. Ct.

Court Oversight and Public Input

The Task Force recommends that the Supreme Court exercise additional control and oversight of the interpretation of the Rules of Professional Conduct and particularly the issuance of opinions that may be raised as a defense in enforcement actions. Additional oversight is appropriate to address concerns that might otherwise be raised regarding such opinions in light of the U.S. Supreme Court's opinion in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. ___, 135 S. Ct. 1101 (2015), as well as to communicate to the public the commitment of the Supreme Court and the State Bar to the oversight of professional conduct. The Task Force believes moreover that, because the Supreme Court is responsible for interpreting the state's rules and laws and for formulating the state's Rules of Professional Conduct, it should have control over the process – that is, its voice should not be supplanted by a group of non-judges for purposes of interpreting those particular rules.

The Task Force accordingly recommends procedural and structural changes to the opinion process to ensure Court oversight as well as opportunities for input from a variety of sources.

Specifically, the Task Force recommends as follows:

1. A new Attorney Ethics Advisory Committee (“AEAC”) should be created that will issue formal opinions on issues of ethics, professionalism, and the unauthorized practice of law. Some issues may span two or more of the subject areas, and consolidating opinion issuance in a single entity will ensure coordination and coverage of all three areas.
2. The AEAC should be established as a committee of the Supreme Court, administratively housed in the Court and with its members appointed by the Court, rather than as a committee of the State Bar.
3. The AEAC should be composed of members of the State Bar from a variety of practice areas, settings, and geographic locations. Terms of service should balance the need for expertise in this technical area with the benefits of obtaining new perspectives. Given the technical nature of the ethical rule interpretation issues, lay members would likely not be able to participate effectively as committee members; however, the Task Force recommends the adoption of a public comment process that would provide an opportunity for input from the public and members of the State Bar.
4. The AEAC should be authorized to take up issues based on (1) requests from attorneys seeking a formal opinion concerning ethics, unauthorized practice of law, or professionalism; (2) issues referred by the State Bar as frequent or repeated issues raised at the Ethics Hotline or in questions directed to the unauthorized practice of law staff; (3) issues referred to it by the Supreme Court; and (4) independent examination of contemporary ethics and professionalism issues, such as those raised by opinions of other jurisdictions (ABA and other states) and rule amendments.

5. An opportunity for public comment should also be built into the formal opinion process, similar to the public input process employed by the Supreme Court Rules Forum used for consideration of proposed rule changes. Opinions should be published in draft form, and a comment period established during which input may be given by the public and client communities, by affected lawyers, and by the State Bar's Lawyer Regulation Office. At the completion of the public comment period and following consideration of the comments, the AEAC would then prepare a final version of the opinion.

6. The Supreme Court should then be given a limited time in which to disapprove a proposed opinion such that it would not take effect. The Task Force defers to the Court regarding the amount of time necessary to perform this function, but recommends that the Court choose a timeframe that balances adequate time for review with the need for guidance on the subject of the opinion.

7. Formal opinions of the AEAC should serve as an affirmative defense in discipline proceedings, just as Judicial Ethics Advisory Committee opinions do in the context of disciplinary proceedings before the Commission on Judicial Conduct, and State Bar members should be able to cite and rely on these opinions in defending against charges brought against them.

8. The Ethics Hotline should remain at the State Bar.

The Task Force will propose rule changes to implement these recommendations.

While the Task Force is unanimous in its recommendation that there needs to be Supreme Court oversight in the formal opinion process, it is not unanimous on where this process should be housed. The consensus of the Task Force was that moving the formal opinion process to the Supreme Court would provide appropriate oversight; however, if the process were to remain at the State Bar within its Ethics Committee, then the requisite oversight could be achieved by mirroring all the recommendations above regarding the AEAC, with the exception of housing the formal opinion process at the Supreme Court.

Enforcement Functions

The Task Force also discussed whether it would be appropriate to recommend moving the prosecutorial functions associated with lawyer discipline or unauthorized practice of law matters from the State Bar to the Supreme Court. Because enforcement is not among the functions of the three committees the Task Force was asked to review, the Task Force concluded that it was neither constituted to make specific recommendations on this issue nor directed by AO 2016-101 to do so. The Task Force therefore did not vote to recommend immediate action, but rather suggests that further study by a separate task force may be in order.

Educational Functions

The Task Force recommends that the (non-formal-opinion) educational functions previously performed by the three committees remain the principal responsibility of the State Bar. This would include regular and periodic CLE programs; educational programs directed at the non-lawyer public; the development and delivery of the required Professionalism Course; and the

publishing of written materials such as the Arizona Ethics Handbook and periodic articles on ethics-related subjects in the *Arizona Attorney Magazine*. The Task Force recommends that the State Bar maintain these educational functions, which provide substantial benefits to lawyers and the public by promoting and supporting competency, ethics, and professionalism. The Task Force also anticipates that the State Bar will likely wish to retain some structure through which it can obtain input from knowledgeable members regarding proposed rule changes in the areas of ethics, professionalism, and the unauthorized practice of law, as it does in other rule-governed areas such as civil and criminal practice.

With regard to the Professionalism Course, the Task Force considered whether it should be left in the Professionalism Committee or folded into the CLE Department of the State Bar, but decided to leave that determination to the State Bar. Regardless where the professionalism course is housed – that is, whether it remains in a stand-alone Professionalism Committee or is moved into the State Bar’s CLE Committee – Task Force members questioned whether, in light of *North Carolina State Board of Dental Examiners* concerns, the State Bar, through either committee, could make determinations regarding approval of independent Professionalism Course applications. The Task Force believes that it can do so if a process is established by which alternative providers may appeal from a decision denying approval. While denials are rare, denying a course by an alternative provider could raise *Dental Examiners* concerns unless the Supreme Court retains adequate oversight of the process. Providing an avenue of court review would address these concerns. A process such as that set forth in Rule 44(f), Ariz. R. Sup. Ct. (relating to review of legal specialization denials), would provide an appropriate method for review of alternative provider denied applications. The Task Force will propose a rule change to implement this recommendation.

Should the Court conclude that the AEAC should be established as a committee of the Supreme Court and that it should be administratively housed at the Court, as recommended in Paragraph 2 of the Task Force recommendations, the Task Force recommends that the Court defer to the judgment of the State Bar Board of Governors regarding the internal organization of the remaining educational and rule-related functions of the existing committees. The State Bar is the institution best suited to determine how to organize these functions, the extent to which the functions should be performed by staff or members, and the appropriate structure for member involvement.² Should the Court conclude that the AEAC should be established as a committee of the Supreme Court but be housed at the State Bar, or that the AEAC should be established as a State Bar committee, the Task Force again recommends that the State Bar be allowed to determine how any of the non-opinion writing functions be addressed. In short, although the Task Force recognizes the Court’s authority over the State Bar, the respective responsibilities of each would best be served by allowing the Board of Governors to decide whether to continue to maintain

² With respect to State Bar Committees, the Task Force understands that the State Bar has undertaken a comprehensive review of its committees and that significant changes to committee structures will be recommended to the Board of Governors. It is the view of the Task Force that, to the extent the non-opinion writing functions remain the responsibility of the State Bar, deference should be accorded to the Board of Governors to determine how best to accomplish those functions.

Ethics, UPL, and Professionalism Committees to address those functions not addressed in this report that are left to the State Bar.

To the extent that the State Bar consolidates, restructures, or otherwise addresses the remaining non-opinion functions of its committees, the Task Force recommends that it do so in a manner that clearly communicates the State Bar's ongoing commitment to ethics, professionalism, and the regulation of the practice of law and the related restriction on the unauthorized practice of law, both to serve its members and to protect and serve the public.

Respectfully submitted,

Task Force on Lawyer Ethics, Professionalism,
and the Unauthorized Practice of Law
Rebecca White Berch, Chair

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